

RON BENDER (SBN 143364)  
KRIKOR J. MESHEFEJIAN (SBN 255030)  
LINDSEY L. SMITH (SBN 265401)  
LEVENE, NEALE, BENDER, YOO & GOLUBCHIK L.L.P.  
2818 La Cienega Avenue  
Los Angeles, California 90034  
Telephone: (310) 229-1234; Facsimile: (310) 229-1244  
Email: RB@LNBYG.COM; KJM@LNBYG.COM; LLS@LNBYG.COM

Proposed Attorneys for Chapter 11 Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SANTA ANA DIVISION**

In re:

TRX HOLDCO, LLC, a Delaware limited  
liability company,

Debtor and Debtor in Possession.

In re:

FITNESS ANYWHERE LLC, a Delaware  
limited liability company, dba TRX and TRX  
Training,

Debtor and Debtor in Possession.

☒ Affects both Debtors

☐ Affects TRX Holdco, LLC only

☐ Affects Fitness Anywhere, LLC only

Lead Case No.: 8:22-bk-10948-SC

Jointly administered with:  
8:22-bk-10949-SC

Chapter 11 Cases

**DEBTORS' MOTION FOR ENTRY OF  
ORDER (I) ESTABLISHING BIDDING  
PROCEDURES FOR FREE AND CLEAR  
SALE OF ASSETS; (II) ESTABLISHING  
PROCEDURES RELATING TO ASSUMPTION  
AND ASSIGNMENT OF EXECUTORY  
CONTRACTS AND UNEXPIRED LEASES;  
(III) APPROVING FORMS OF NOTICE; (IV)  
APPROVING FORM OF ASSET PURCHASE  
AGREEMENT; (V) SCHEDULING AN  
AUCTION; (VI) SCHEDULING A SALE  
HEARING; AND (VII) GRANTING RELATED  
RELIEF; MEMORANDUM OF POINTS AND  
AUTHORITIES  
[SUPPORTIVE DECLARATION FILED  
CONCURRENTLY HEREWITH]**

**Date: June 30, 2022**

**Time: 10:00 a.m.**

**Place: \*Via ZoomGov**

Courtroom 5C  
411 West Fourth Street  
Santa Ana, CA 92701

**TABLE OF CONTENTS**

MEMORANDUM OF POINTS AND AUTHORITIES .....	8
I. STATEMENT OF FACTS.....	8
A. Brief Description Of The Debtors And Their Business.....	8
B. Events Leading To Bankruptcies And The Debtors’ Chapter 11 Goals.....	10
C. The Debtors’ Primary Assets and Secured Loans.....	12
II. PROPOSED BIDDING AND SALE PROCEDURES.....	13
Due Diligence Access / Participation Requirements .....	13
Bid Deadline for Proposed Stalking Horse Bidders .....	14
Bid Requirements.....	14
Qualified Bidders and Bids.....	17
No Other Use of Credit Bids.....	18
Notice of Qualified Bids .....	18
Auction.....	18
No Collusion; Good Faith Bona Fide Offer.....	19
Opening Bid at the Auction .....	19
Conducting the Auction .....	19
Selection of the Winning Bid and Winning Back-Up Bid.....	21
Return of Deposits Following the Completion of the Auction.....	22
Sale Hearing.....	22
III. PROPOSED SALE NOTICE AND CURE NOTICE .....	23
A. <i>Proposed Sale Notice</i> .....	23
B. <i>Proposed Cure Notice</i> .....	23

1	IV. DISCUSSION.....	26
2	A.    The Proposed Bidding Procedures Should Be Approved By The Court. ....	26
3	B.    The Court Should Also Approve The Assumption And Assignment	
4	Procedures Of the Designated Contracts. ....	29
5	V. CONCLUSION.....	31

# **TABLE OF AUTHORITIES**

**Page(s)**

## **Federal Cases**

<u>In re AEG Acquisition Corp.</u> , 127 B.R. 34 (Bankr. C.D. Cal. 1991), <u>aff'd</u> 161 B.R. 50 (9th Cir. B.A.P. 1993).....	30
<i>In re Atlanta Packaging Products, Inc.</i> , 99 B.R. 124 (Bankr. N.D. Ga. 1988) .....	27
<u>In re Bowman</u> , 194 B.R. 227 (Bankr. D. Ariz. 1995).....	30
<u>In re Central Fla. Metal Fabrication, Inc.</u> , 190 B.R. 119 (Bankr. N.D. Fla. 1995).....	29
<u>In re Continental Country Club, Inc.</u> , 114 B.R. 763 (Bankr. M.D. Fla. 1990) .....	29
<i>In re Crowthers McCall Pattern, Inc.</i> , 114 B.R. 877 (Bankr. S.D.N.Y. 1990).....	28
<u>In re Embers 86th Street. Inc.</u> , 184 B.R. 892 (Bankr. S.D.N.Y. 1995).....	30
<u>In re Gucci</u> , 193 B.R. 411 (S.D.N.Y. 1996).....	29
<u>In re Klein Sleep Products, Inc.</u> , 78 F.3d 18 (2d. Cir. 1996) .....	29
<u>In re Prime Motors Inns</u> , 124 B.R. 378 (Bankr. S.D. Fla. 1991) .....	29

## **Federal Statutes**

11 U.S.C. §§ 105(a), 361 and 363.....	2
11 U.S.C. § 365(b)(1) .....	29, 30
11 U.S.C. § 503.....	17
11 U.S.C. § 105(a) .....	26
11 U.S.C. § 363(b)(1) .....	26
11 U.S.C. § 365.....	23, 25
11 U.S.C. § 365(f)(1) .....	30

11 U.S.C. § 365(f)(2) .....29, 30

**Other Authorities**

Bankruptcy Rule 6004 .....26

Bankruptcy Rules 2002, 6004 and 6006 .....26

Fed. R. Bankr. Proc. 6004(f).....26

Federal Rules of Bankruptcy Procedure Rule 2002.....23

Federal Rules of Bankruptcy Procedure Rules 2002 and 6004 .....26

Local Bankruptcy Rule 6004-1 .....26

Local Bankruptcy Rule 6004-1(b) .....3

Local Bankruptcy Rule 6004-1(b)(1).....27

Local Bankruptcy Rule 6004-1(b)(2).....27

Local Bankruptcy Rules 6004-1(b) and 9013-1.....2

1 **TO THE HONORABLE SCOTT C. CLARKSON, UNITED STATES BANKRUPTCY**  
2 **JUDGE, THE UNITED STATES TRUSTEE, THE DEBTORS' SECURED CREDITOR**  
3 **AND TWENTY LARGEST UNSECURED CREDITORS, AND ALL PARTIES WHO**  
4 **HAVE REQUESTED SPECIAL NOTICE IN THESE CASES:**

5 Pursuant to Local Bankruptcy Rules 6004-1(b) and 9013-1, and 11 U.S.C. §§ 105(a), 361  
6 and 363, TRX Holdco, LLC ("Hold Co") and Fitness Anywhere LLC, dba TRX and TRX  
7 Training ("Product Co" and together with Hold Co and Product Co, the "Debtors"), the debtors  
8 and debtors-in-possession in the above-captioned Chapter 11 bankruptcy cases<sup>1</sup>, hereby file this  
9 motion (the "Motion") seeking the entry of an order in substantially the form appended as  
10 **Exhibit "1"** to the Declaration of Joshua Benn (the "Benn Declaration") filed herewith (the  
11 "Bidding Procedures Order") that, among other things:

- 12 (i) Approves the Debtors' proposed bidding procedures ("Bidding Procedures")  
13 substantially in the form in **Exhibit "2"** to the Benn Declaration for the sale of  
14 substantially all of the Debtors' assets related to the operation of the Debtors'  
15 business (the "Purchased Assets"), free and clear of all liens, claims,  
16 encumbrances and other interests;
- 17 (ii) Establishes and approves procedures relating to the Debtors' assumption and  
18 assignment of executory contracts and unexpired leases and which approves the  
19 form of notice to be provided to all counterparties to executory contracts and  
20 unexpired leases attached as **Exhibit "3"** to the Benn Declaration;
- 21 (iii) Approves the Debtors' proposed form of notice to be sent to all creditors, equity  
22 holders, proposed buyers and other parties in interest in the form attached as  
23 **Exhibit "4"** to the Benn Declaration;
- 24 (iv) Approves the Debtors' proposed form of asset purchase agreement (the "Template  
25 APA") without exhibits in the form attached as **Exhibit "5"** to the Benn  
26 Declaration;

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27  
28 <sup>1</sup> The Court previously entered an order approving the joint administration of these chapter 11

(v) Schedules an auction ("Auction");

(vi) Schedules a hearing for the Court to consider approval of the sale of the Purchased Assets to the winning bidder and winning back-up bidder at the Auction ("Sale Hearing"); and

(vii) Grants related relief.

The documents that are attached as **Exhibits 1 - 5** to the Benn Declaration are substantially complete, but subject to continuing discussions, revisions and amendments, and, thus, may not yet be final. If any changes are made to any such documents, the Debtors will file the updated versions with the Court prior to the hearing date on this Motion. The complete bases of the Motion are set forth in the Memorandum of Points and Authorities annexed hereto and the supporting declaration. The Debtors have scheduled a hearing on this Motion pursuant to Local Bankruptcy Rule 6004-1(b) given the Debtors' financial situation and desire to consummate a sale of the Purchased Assets as soon as possible but at the same time establishing bidding procedures that have been carefully thought out and vetted with the Debtors' investment banker designed to achieve the highest and best price possible for the Purchased Assets under the circumstances of these chapter 11 bankruptcy cases.

As set forth in the Debtors' various first-day motions, the Debtors made a determination shortly prior to their bankruptcy filings that proceeding with a free and clear asset sale process was in the best interests of their estate. While it appears that there is a substantial amount of interest in the buying community to acquire the Debtors' business and by many to serve as a stalking horse bid, since the Debtors only commenced their free and clear asset sale process shortly prior to their bankruptcy filings, the Debtors do not yet have a stalking horse bid lined up. The Debtors therefore believe that proceeding at this point to the Auction without a stalking

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bankruptcy cases.

1 horse bid in hand is the best option for these bankruptcy estates, with the Debtors retaining the  
2 right to seek an alternative order from the Court if facts and circumstances dictate otherwise.

3 After extensive consultation with the Debtors' well regarded and experienced investment  
4 banker in Kroll Securities, LLC ("Kroll"), and after taking into account the Debtors' financial  
5 situation, including the possibility that the Debtors will be provided with post-petition financing  
6 from the Debtors' pre-petition secured lender, Woodforest National Bank (the "Bank"), the  
7 Debtors believe that the following is the optimal timetable in order to achieve the highest and  
8 best price for the Purchased Assets:  
9

10 **July 27, 2022 at 5 p.m. (prevailing Pacific time) – Initial Bid Deadline**

11 Deadline by when initial bids need to be submitted by parties who wish to participate in the  
12 Auction. In order to participate in the Auction, all prospective bidders must do all of the  
13 following:  
14

- 15 1. Submit a redlined version of the template asset purchase agreement (the "Template  
16 APA") indicating all changes that are requested to be made to the Template APA, with  
17 the Template APA to include their proposed initial bid;
- 18 2. Submit all documents to enable Kroll to determine whether the proposed bidder is  
19 financially qualified to participate in the Auction; and
- 20 3. Submit a deposit equal to 10% of the proposed initial bid, which 10% deposit would be  
21 deemed non-refundable if the bidder is deemed to be the winning bidder at the Auction  
22 and then the Debtors' proposed free and clear sale of the Purchased Assets to the bidder  
23 is approved by the Bankruptcy Court. Bidders will have the right to withdraw their bid at  
24 any time up until Noon (prevailing Pacific time) on August 2, 2022, in which case they  
25 will receive a return of their 10% deposit and no longer be eligible to participate in the  
26 Auction.  
27  
28



1           **August 3, 2022 commencing at 10 a.m. (prevailing Pacific time)** - Auction to be held at  
2 the offices of Levene, Neale, Bender, Yoo & Golubchik L.L.P., which are located at 2818 La  
3 Cienega Avenue, Los Angeles, CA, or via zoom with all Qualified Bidders to be provided with  
4 particulars in advance of the Auction.  
5

6           **Sale Hearing** - hearing for the Court to consider approval of the Debtors' proposed sale  
7 of the Purchased Assets to the winning bidder at the Auction – (to be set by Court at the hearing  
8 on this Motion – the Debtors are seeking to have this hearing be the first date possible after the  
9 August 3, 2022 Auction).  
10

11           **August 12, 2022** - Outside date by when the winning bidder at the Auction is required to  
12 close its purchase of the Purchased Assets unless the winning bidder and the Debtors jointly  
13 agree to extend the outside closing date.

14           These proposed Bidding Procedures are designed to ensure that the highest price possible  
15 is paid for the Purchased Assets by a purchaser who has the financial ability to close on a  
16 purchase of the Purchased Assets. This is being done by providing all prospective buyers with a  
17 level playing field with no bidder having any financial advantage over any other bidder.<sup>2</sup> Kroll  
18 has already established an extensive data room and, to date, approximately 45 prospective  
19 bidders have signed NDA's who are actively engaged in the data room in connection with the  
20 current asset sale process, and Kroll is receiving new and additional inquiries virtually daily –  
21 meaning that this is a very active asset sale process. Kroll is also in discussions with numerous  
22 prospective buyers regarding the possibility of serving as a stalking horse bidder. Even if the  
23 Debtors reach an agreement with a financially qualified buyer to serve as the stalking horse  
24  
25

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26  
27 <sup>2</sup> The Debtors reserve the right to accept a stalking horse bid presented to the Debtors before  
28 July 27, 2022 and/or to seek a further order of the Bankruptcy Court to modify any of the terms  
of these Bidding Procedures.

1 bidder which will then be presented to the Court for approval, the Debtors will still insist upon an  
2 overbid process to make sure that all prospective bidders have the opportunity to overbid the  
3 stalking horse bid at an open Auction process to insure that the highest and best price is  
4 ultimately paid for the Purchased Assets.  
5

6 The Debtors (after extensive consultation with Kroll) are confident that the proposed  
7 Bidding Procedures make the most sense under the circumstances of these cases to result in the  
8 highest and best price being paid for the Purchased Assets.

9 For all of the reasons set forth herein and in the accompanying Memorandum of Points  
10 and Authorities and concurrently filed Declaration, the Debtors believes that the proposed  
11 Bidding Procedures and all of the relief sought herein are in the best interests of the Debtors'  
12 estates as they have been designed to achieve the highest and best price for the Purchased Assets.

13 **PLEASE TAKE FURTHER NOTICE** that this Motion is based upon this Notice of  
14 Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently  
15 filed Benn Declaration and all Exhibits attached thereto, the entire record of the Debtors'  
16 bankruptcy cases, the statements, arguments, and representations of counsel to be made at the  
17 hearing on this Motion, and any other evidence properly presented to the Court.

18 **WHEREFORE**, the Debtors respectfully requests that this Court do all of the following:

- 19 (1) grant this Motion in its entirety;
- 20 (2) enter the Bidding Procedures Order in substantially the form appended as **Exhibit**  
21 **"1"** to the Benn Declaration;
- 22 (3) Approve the Bidding Procedures substantially in the form described in **Exhibit**  
23 **"2"** attached to the Benn Declaration for the sale of the Purchased Assets free and  
24 clear of all liens, claims, encumbrances and other interests;
- 25 (4) Establish and approve procedures relating to the Debtors' assumption and  
26 assignment of executory contracts and unexpired leases and which approves the  
27 form of notice to be provided to all counterparties to executory contracts and  
28 unexpired leases attached as **Exhibit "3"** to the Benn Declaration;

- 1 (5) Approve the Debtors' proposed form of notice to be sent to all creditors, equity  
2 holders, proposed buyers and other parties in interest in the form attached as  
3 **Exhibit "4"** to the Benn Declaration;
- 4 (6) Approve the Template APA (without exhibits) in the form attached as **Exhibit**  
5 **"5"** to the Benn Declaration;
- 6 (7) Schedule the Auction for August 3, 2022 as requested in the Motion;
- 7 (8) Schedule the Sale Hearing for the Court to consider approval of the Debtors' sale  
8 of the Purchased Assets to the winning bidder and winning back-up bidder at the  
9 Auction; and
- 10 (9) Grant such other and further relief as the Court deems just and proper under the  
11 circumstances.

12 Dated: June 23, 2022

TRX HOLDCO, LLC  
FITNESS ANYWHERE LLC

14 By: /s/ Ron Bender  
15 RON BENDER  
16 KRIKOR J. MESHEFEJIAN  
17 LINDSEY L. SMITH  
18 LEVENE, NEALE, BENDER,  
19 YOO & GOLUBCHIK L.L.P.  
20 Proposed Attorneys for Chapter 11 Debtors  
21 and Debtors in Possession  
22  
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

**STATEMENT OF FACTS**<sup>3</sup>

**A. Brief Description Of The Debtors And Their Business.**

1. The Debtors and their respective subsidiaries (collectively referred to herein as “TRX”) comprise a world leading functional fitness company. Since being founded in 2004, TRX has evolved into a digitally-enabled, vertically integrated, omni-channel fitness lifestyle brand with global reach powered by a large community of consumer and trainer enthusiasts.<sup>4</sup> TRX’s flagship and patented product - Suspension Trainer™ - is a highly versatile, portable, compact and affordable fitness and training device/workout tool with broad reach across demographic groups and fitness levels, which can be utilized effectively across fitness modalities. TRX offers a full line of functional training tools and accessories to complement the Suspension Trainer™ to serve all types of functional needs, from at-home essentials to complete gym installations. TRX also launched in 2021 a purpose-built digital subscription-based platform - the TRX Training Club® - that offers a library of on-demand video and daily live classes.

2. TRX enjoys a strong origin story (the first version of the Suspension Trainer™ was created in 1997 by Randy Hetrick, the founder of TRX), significant brand recognition and intellectual property protections around its flagship product Suspension Trainer™, which is distributed in over thirty (30) countries through commercial channels (gyms and vertical markets) and consumer markets (including through its direct-to-consumer platform [www.TRXtraining.com](http://www.TRXtraining.com) in the United States and United Kingdom, Amazon, and other retailers).

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<sup>3</sup> The Debtors incorporate herein by this reference the *Declaration of Brent Leffel In Support Of Debtors’ Cash Collateral Motion* (Doc 8) filed on June 8, 2022, in support of the facts set forth herein.

<sup>4</sup> Hold Co holds a preferential and controlling interest in Product Co. Hold Co also wholly owns TRXperience, LLC (“Experience Co”). Experience Co has not filed a bankruptcy case. Product Co wholly owns Fitness Anywhere International LLC (100% by Product Co) and Fitness Anywhere Europe Cooperatief U.A. Netherlands (99% by Product Co and 1% by Fitness Anywhere International LLC), none of which have filed a bankruptcy case.

1           3.       From 2004 through 2013, Mr. Hetrick launched and commercialized TRX,  
2 building a loyal community of trainers and market penetration in gyms. From 2014 to 2018, the  
3 TRX business matured after receiving a growth capital investment. In late 2018, an investor  
4 group led by Equity 38, LLC acquired the business in a highly structured transaction which  
5 included a credit facility with Woodforest National Bank (the “Bank”) alongside an equity  
6 investment and rollover investment from the previous investors, and, in 2019, various  
7 operational improvement initiatives were implemented to restructure the business. By the end of  
8 2019, the business required a capital infusion to reset its credit facility with the Bank and also  
9 secure operating capital to execute on a strategy which incorporated the pursuit of digital  
10 initiatives to broaden the company’s revenue opportunities beyond sales of its flagship product.

11           4.       In March 2020, Hold Co was formed and additional equity capital was invested  
12 by existing and new investors in a further recapitalization of TRX. A portion of such proceeds  
13 were invested in Product Co to repay senior debt and provide working capital financing, and the  
14 balance remained at Hold Co to fund growth initiatives such as digital. After giving effect to the  
15 March 2020 recapitalization, Hold Co held a preferential and controlling interest in Product Co,  
16 and also became a guarantor of the credit facility. Hold Co also owns 100% of the interests of  
17 Experience Co, an entity that was formed at the time of the recapitalization for purposes of  
18 housing TRX’s digital platform services that were beginning to be developed and for its  
19 educational services and offerings through which TRX has qualified training professionals on  
20 suspension training/functional training techniques and programming. While the different entities  
21 were established to allow for a segregation of the equity investment made in the recapitalization  
22 and to limit dilution to legacy shareholders, TRX has operated as one identifiable brand in the  
23 market, and through intercompany agreements, including a management services agreement  
24 between Hold Co and Product Co wherein Hold Co provides the services of executive  
25 management that oversee the entire TRX enterprise, it also effectively operates as a consolidated  
26 business.

27           5.       In 2019, the Debtors generated approximately \$51 million in revenue. In 2020,  
28 the Debtors formulated a digital strategy with outside consultants while experiencing COVID-

1 driven revenue growth, to approximately \$85 million. In 2021, the Debtors executed and  
2 invested in a number of initiatives focused on digital and marketing, hiring executives in key  
3 roles while building a significant inventory position and navigating through a rapidly changing  
4 macro environment, and generated approximately \$62 million in sales.

5 **B. Events Leading To Bankruptcies And The Debtors' Chapter 11 Goals.**

6 6. Despite the development and success of the Debtors' products over the years, the  
7 Debtors' revenue and cash flow from operations has been insufficient to support their current  
8 business operations as well as their continued growth. There have been many reasons for this  
9 including competition, macroeconomic conditions, purchases of inventory in anticipation of  
10 demand that did not occur in an unpredictable market, and higher than anticipated development  
11 costs associated with the Debtors' digital training platform and increased marketing expenses,  
12 partially attributable to general increases in paid advertising. It became apparent in late 2021  
13 that the Debtors would require additional cash and investment to fund the Debtors' long-term  
14 operations and growth and satisfy the Debtors' secured debt obligations owed to the Bank of  
15 more than \$19 million.<sup>5</sup>

16 7. Pre-petition, the Debtors hired Kroll Securities, LLC ("Kroll") and Integrity  
17 Square LLC to, among other things, identify prospective investors and seek to obtain additional  
18 investments in the Debtors' business to further capitalize the Debtors and meet the Debtors'  
19 operational and growth needs, or engage in a sale transaction. The Debtors' pre-petition efforts  
20 to raise capital to pay down debt or engage in a strategic merger/acquisition with/by a buyer or  
21 investor did not result in a consummated transaction.

22 8. The Debtors believe that timing and macroeconomic considerations both played a  
23 role in the Debtors not consummating a pre-petition transaction. For example, while various  
24

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25 <sup>5</sup> Product Co and the Bank are parties to a Credit Agreement, dated as of December 26, 2018, as  
26 amended, pursuant to which Product Co obtained from the Bank a term loan in the principal  
27 amount of \$10,875,000, a term loan in the principal amount of \$1,000,000, and revolving loans  
28 in the principal and outstanding amount of \$7,500,000, for a total principal balance of  
\$19,375,000, which are secured by substantially all assets of the Debtors, and which are  
guaranteed by Hold Co, Experience Co and Fitness Anywhere International, LLC.

1 parties expressed interest in a transaction with the Debtors, those who signed nondisclosure  
2 agreements and engaged in discussions with the Debtors did not ultimately proceed with  
3 engaging in a transaction. The Debtors also explored potential financing arrangements and  
4 received various expressions of interest.<sup>6</sup>

5 9. The Debtors' current financial situation is precarious in that the Debtors estimate  
6 that unless they can consummate a transaction or obtain additional financing, the Debtors will  
7 not have sufficient liquidity to replenish inventory, impairing future customer sales and  
8 thereafter negatively impacting the Debtors' goodwill. The Debtors believe that if there was a  
9 shutdown of their business with a resulting liquidation, it would be a disastrous result for  
10 creditors, including the Bank.<sup>7</sup>

11 10. Despite these challenges, the Debtors believes that (i) the TRX brand is well-  
12 regarded and its products and services have significant demand; (ii) TRX has a compelling  
13 business model with significant growth opportunities; (iii) TRX is well-positioned to capitalize  
14 on growth in the fitness industry; and (iv) the Debtors' business is extremely valuable especially  
15 when considering its substantial intellectual property portfolio that enables the Debtors to protect  
16 it against imitators of its famous Suspension Trainer™ product and the significant goodwill it  
17 has amassed with its consumers and qualified TRX trainers throughout its history. Moreover, the  
18 pre-petition marketing process undertaken by Kroll and Integrity Square was designed to result  
19 in a recapitalization of the Debtors' business and was not marketed as a distressed free and clear  
20 asset sale.

21 11. Based on the foregoing, the Debtors determined in the exercise of their business  
22 judgment that the best option available to the Debtors would be to conduct an expedited free and  
23 clear asset sale process in a chapter 11 bankruptcy proceeding and consummate that asset sale

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24 <sup>6</sup> It is possible that the Debtors will require debtor in possession financing if the Debtors' cash on  
25 hand and cash generated post-petition are not sufficient to meet all of the Debtors' operational  
26 needs during this chapter 11 case. Additionally, in order for the Debtors to purchase any  
significant inventory going forward, the Debtors will require additional funding.

27 <sup>7</sup> The Debtors are in discussions with the Bank regarding the Bank providing the Debtors with  
28 post-petition financing, which, if consummated, will be presented to the Court by way of a  
separate motion.

1 before the Debtors' inventory falls below required operational levels and the Debtors run out of  
2 sufficient liquidity to sustain operations.<sup>8</sup> The Debtors believe that proceeding in this manner  
3 will afford them with the best opportunity to achieve the maximum price possible for their assets  
4 for the benefit of their creditors and other parties in interest. The Debtors are optimistic that this  
5 free and clear asset sale process will result in a successful sale transaction closing. Given the  
6 high level of interest that has already been expressed by the buying community, the Debtors are  
7 hopeful that the sale will result in a purchase price sufficient to pay the Bank in full and provide  
8 for a distribution to the rest of the Debtors' creditors.

9 12. The Debtors' goal in these bankruptcy cases is to consummate a free and clear  
10 asset sale for the most money possible. The Debtors' proposed Bidding Procedures are designed  
11 to achieve this result.

12 **C. The Debtors' Primary Assets and Secured Loans.**

13 13. The Debtors' primary assets are comprised of accounts receivable in the  
14 approximate gross amount of \$5.1 million as of the Petition Date, inventory with a cost basis of  
15 approximately \$17.8 million as of the Petition Date, intellectual property and goodwill associated  
16 with the Debtors' well-regarded brand, and the Debtors' vast domestic and international  
17 customer base.

18 14. To support the financial needs of their growth and operations, on or about  
19 December 26, 2018, the Debtors (with Product Co as borrower and Hold Co ultimately as one of  
20 three guarantors<sup>9</sup>) obtained a senior secured credit facility revolving credit facility from the  
21 Bank, secured by substantially all of the Debtors' assets and property. The credit facility is  
22 evidenced by that certain "Credit Agreement Dated as of December 26, 2018" as amended from  
23

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24  
25 <sup>8</sup> While the Debtors' Budgets reflect that the Debtors are projected to have sufficient cash during  
26 the term of the Budgets to fund the expenses in the Budgets, the Budgets do not include  
substantial additional purchases of inventory.

27 <sup>9</sup> The other two guarantors are Experience Co (a wholly owned subsidiary of Hold Co) and  
28 Fitness Anywhere International, LLC (a wholly owned subsidiary of Product Co). Hold Co and  
Experience Co became guarantors in connection with a recapitalization of TRX completed in



1 time to time, in the original principal amount of \$20,000,000. Based on five amendments to the  
2 Credit Agreement, the credit facility is currently comprised of a term loan with a principal  
3 balance of \$10,875,000, a term loan with a principal balance of \$1,000,000, and revolving loans  
4 up to \$8,000,000 with a principal balance of \$7,500,000. As of the Petition Date, the total  
5 principal balance of the loans made by the Bank to the Debtors is approximately \$19,375,000.  
6

7 15. The Debtors also have a substantial amount of pre-petition unsecured debt.

8 **II.**

9 **PROPOSED BIDDING AND SALE PROCEDURES**

10 The Debtors' proposed Bidding Procedures which the Debtors are requesting the Court to  
11 approve are attached as **Exhibit "2"** to the concurrently filed declaration of Joshua Benn. Below is  
12 a summary of the key provisions of the Bidding Procedures:  
13

14 **Due Diligence Access / Participation Requirements**

15 In order to participate in the Auction process as a bidder, a person or entity interested in  
16 purchasing the Purchased Assets (a "Potential Bidder") must deliver or have previously delivered  
17 to Kroll all of the following documents (the "Participation Requirements"): (1) an executed non-  
18 disclosure agreement with the form to be obtained from Kroll; (2) a statement demonstrating a  
19 bona fide interest in purchasing the Purchased Assets; and (3) one of the following: (i) written  
20 evidence of readily available funds equal to the Potential Bidder's initial bid and any increase the  
21 Potential Bidder desires to have authority to bid to, with Kroll to keep all such information  
22 completely confidential, (ii) a firm commitment for financing sufficient for the Potential Bidder  
23 to timely consummate its purchase of the Purchased Assets, or (iii) other sufficient information,  
24 which may include current audited financial statements and the latest unaudited financial  
25 statements of the Potential Bidder and/or its equity holders, or such other form of financial  
26  
27

28 2020.

disclosure and credit-quality support or enhancement that will allow Kroll to make a reasonable determination as to the Potential Bidder's financial and other capabilities to timely consummate its purchase of the Purchased Assets. Any Potential Bidder who has satisfied the foregoing Participation Requirements will be afforded, subject to the other provisions of these Bidding Procedures, due diligence access and additional information through access to an online data room, as well as, upon reasonable advance notice, on-site visits and direct communication with management as the Potential Bidder desires and Kroll determines to be appropriate under the circumstances and subject to the availability of such management.

#### **Bid Deadline for Proposed Stalking Horse Bidders**

The deadline for a Potential Bidder to submit its initial bid for the Purchased Assets ("Initial Bid") is **July 27, 2022 at 5:00 p.m. (prevailing Pacific time)** (the "Initial Bid Deadline"). An Initial Bid received after the Initial Bid Deadline shall not be considered.

#### **Bid Requirements**

To be eligible to participate in the Auction, each Initial Bid and each Potential Bidder submitting an Initial Bid (each, a "Bidder") must be determined by the Debtors and Kroll to have satisfied all of the conditions listed below (collectively, the "Bid Requirements"):

1. ***Terms.*** An Initial Bid must be accompanied by a clean and redlined version of the APA, with the redlined version of the APA to show all of the Potential Bidder's requested changes to the Template APA.

2. ***No Contingencies.*** An Initial Bid must include a statement that there are no conditions precedent to the Bidder's authority to enter into or consummate a definitive agreement, other than entry by the Bankruptcy Court of an order approving the sale of the Purchased Assets to the Bidder.

1           3.       ***Bid Requirements.*** An Initial Bid must set forth a cash purchase price for the  
2 Purchased Assets. Without limiting the generality of the foregoing, an Initial Bid (i) may not  
3 contain representation or warranties, covenants, or termination rights materially more onerous in  
4 the aggregate than are set forth in the Template APA, as determined by the Debtors and Kroll,  
5 (ii) may not be conditioned upon obtaining financing, any internal, regulatory, or other third  
6 party approvals, or on the outcome or review of due diligence, (iii) may not provide for a closing  
7 date that will be later than August 12, 2022, unless both the Debtors and the winning bidder  
8 jointly agree to extend the Sale closing date at their sole and absolute discretion, and (iv) may not  
9 be conditioned upon the Bankruptcy Court order approving the sale becoming a “final order.”  
10

11           4.       ***Irrevocable.*** An Initial Bid must state that unless the Bidder withdraws its Initial  
12 Bid by Noon (prevailing Pacific time) on August 2, 2022, an Initial Bid must state that such offer  
13 is binding and irrevocable until the conclusion of the Sale Hearing and such Initial Bid must  
14 continue to remain binding and irrevocable through the Sale Closing if the Initial Bid or any  
15 higher bid submitted at the Auction is accepted by the Debtors at the Auction as the Winning Bid  
16 (defined below) or the Winning Back-Up Bid (defined below) and approved by the Bankruptcy  
17 Court at the Sale Hearing.  
18  
19

20           5.       ***Identity of Bidder.*** An Initial Bid must fully disclose the identity of each entity or  
21 person that will be bidding for or purchasing the Purchased Assets, including all material equity  
22 holders (i.e., parties that own at least 10% of the equity of the Bidder) in the case of a Bidder that  
23 is an entity specially formed for the purpose of effectuating the contemplated transaction, or  
24 otherwise participating in connection with such Initial Bid, and the complete terms of any such  
25 participation, including any agreements, arrangements or understanding concerning collaborative  
26 or joint bid or any other combination concerning the proposed Initial Bid. An Initial Bid must  
27 also fully disclose any connection with or participation by any “insider” of the Debtors or any  
28

1 relative or any affiliate of any “insider” of the Debtors. An Initial Bid must also fully disclose  
2 any connection with or participation by any current creditor or equity holder of the Debtors.

3  
4 6. **Contact Information.** An Initial Bid must include the names and contact  
5 information (including phone numbers and email addresses) of all authorized representatives of  
6 the Bidder who will be available to answer questions regarding the Initial Bid, including advisors  
7 and related parties.

8  
9 7. **Deposit.** An Initial Bid must include a good-faith deposit in immediately available funds  
10 equal to ten percent (10%) of the amount of the Initial Bid (the “Deposit”). If a Bidder elects  
11 to increase the amount of its Initial Bid at the Auction, the Bidder will not be required to  
12 increase the amount of its Deposit. If a Bid is determined to be the Winning Bid at the  
13 Auction and the Bidder who submitted such Bid fails to timely close the Sale for any reason  
14 other than the Bankruptcy Court not approving the Bid at the Sale Hearing, the Deposit shall  
15 become non-refundable and be forfeited to the Debtor. The same shall apply to any Winning  
16 Back-Up Bid in the event the Winning Bidder fails to timely close the Sale, the Winning  
17 Back-Up Bidder is notified in writing that it is now the Winning Bidder, and the Winning  
18 Back-Up Bidder fails to close its purchase within ten (10) days of having been notified that it  
19 is now the Winning Bidder, unless the Winning Bidder and the Debtors jointly agree to  
20 extend the sale closing date. All Deposits of all Qualified Bidders shall be held in a  
21 segregated trust account maintained by LNBYG and shall be returned (other than with  
22 respect to the Winning Bidder and the Winning Back-Up Bidder) promptly after the  
23 conclusion of the Auction. All Bidders shall have the right to withdraw their Initial Bid at  
24 any time up until Noon (prevailing Pacific time) on August 2, 2022, in which case the Bidder  
25 will receive a return of their Deposit and be prohibited from participating in the Auction.  
26  
27  
28

1           8.       ***Financing Sources.*** An Initial Bid must contain written evidence of available  
2 funds or a firm irrevocable commitment for financing sufficient to consummate the proposed  
3 Sale with appropriate contact information for such financing sources, with Kroll to determine  
4 whether such evidence of financing satisfies these Bidding Requirements and enables the Bidder  
5 to participate in the Auction, with such determination to be in Kroll's sole and absolute  
6 discretion.  
7

8           9.       ***Designation of Assigned Contracts and Leases.*** Subject to the ability of the  
9 Debtors to obtain an order of the Bankruptcy Court approving of the Debtors' assumption and  
10 assignment of any executory contract or unexpired lease to the Winning Bidder, an Initial Bid  
11 must identify all of the Debtors' executory contracts and unexpired leases with respect to which  
12 the Bidder seeks assignment from the Debtors, with the Winning Bidder having the right to  
13 amend such list at any time prior to the commencement of the Sale Hearing.  
14

15           10.      ***Designation of Assumed Liabilities.*** An Initial Bid must identify all liabilities  
16 that the Bidder proposes to assume.  
17

18           11.      ***Termination Fees.*** An Initial Bid must not entitle the Bidder to any break-up fee,  
19 termination fee, expense reimbursement or similar type of payment or reimbursement, and by  
20 submitting the Initial Bid, the Bidder waives the right to pursue a substantial contribution claim  
21 under 11 U.S.C. §503 related in any way to the submission of its Initial Bid or its participation in  
22 the Auction.  
23

#### 24                                   **Qualified Bidders and Bids**

25           Potential Bidders who have satisfied the Participation Requirements and Bid  
26 Requirements will be deemed "Qualified Bidders," and Bids that meet all of the Bid  
27 Requirements described above will be deemed "Qualified Bids," in each case, only if the Debtors  
28

1 and Kroll conclude in the exercise of their business judgment, that such Bid would be  
2 consummated if selected as the Winning Bid; provided, however, that, for avoidance of doubt, if  
3 any Qualified Bidder fails to comply with reasonable requests for additional information and due  
4 diligence access from the Debtors or Kroll to their satisfaction, the Debtors and Kroll shall have  
5 right, in their sole and absolute discretion, to disqualify any Qualified Bidder and Qualified Bid,  
6 and such Bidder shall not be entitled to attend or otherwise participate in the Auction.  
7

8  
9 **No Other Use of Credit Bids**

10 Other than the Bank, there are no known liens against the Purchased Assets.  
11 Accordingly, other than the Bank should it wish to be a Bidder, no other party in interest or  
12 creditor may offer any type of credit bidding in connection with any Bid or the Sale.

13 **Notice of Qualified Bids**

14 By 2:00 p.m. (prevailing Pacific time) on August 2, 2022, Kroll shall identify to all  
15 Qualified Bidders: (a) each and every Initial Bid that Kroll considers to be a Qualified Bid and  
16 (b) if more than one Qualified Bid has been timely received, the Qualified Bid that will  
17 constitute the Opening Bid at the Auction and the bidding order in which the Auction will be  
18 conducted.  
19

20 **Auction**

21 If no Qualified Bids are received then the Auction will be deemed automatically  
22 cancelled unless the Debtors and Kroll determine otherwise, in their sole and absolute discretion.  
23 If only one Qualified Bid is received, there will be no Auction and the Qualified Bidder will be  
24 deemed the Winning Bidder. If more than one Qualified Bid is received, the Auction will  
25 proceed as scheduled with the Auction to commence at 10:00 a.m. (prevailing Pacific time) on  
26 August 3, 2022 at the law offices of Levene, Neale, Bender, Yoo & Golubchik L.L.P., 2818 La  
27  
28

Cienega Avenue, Los Angeles, California [with zoom participation permitted].

**Participation in and Attendance at Auction**

Only Kroll, the Debtors, and Qualified Bidders along with their representatives, counsel, and advisors, and any Official Committee of Unsecured Creditors and its counsel may attend the Auction (such Auction to be in person or via Zoom, Webex or similar virtual means, as applicable), and only Qualified Bidders shall be permitted to submit any Bids at the Auction.

**No Collusion; Good Faith Bona Fide Offer**

Each Qualified Bidder participating in the Auction will be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the bidding; (ii) its Bid is a good-faith *bona fide* offer; (iii) it intends to consummate the proposed transaction if selected as the Winning Bidder; and (iv) it acknowledges that, if chosen, it will serve as the Winning Back-Up Bidder.

**Opening Bid at the Auction**

The Qualified Bid determined by Kroll and the Debtors to constitute the highest and best Initial Bid will serve as the opening bid (the “Opening Bid”) at the Auction. Kroll will notify all Qualified Bidders in advance of the Auction which Initial Bid has been accepted as the Opening Bid at the Auction and the order in which the bidding at the Auction will proceed.

**Conducting the Auction**

Kroll and LNBYG will direct and preside over the Auction. At the start of the Auction, and after each Qualified Bidder acknowledges on the record that it has not engaged in any collusion with respect to the bidding, that its Bid is a good faith bona fide offer, and that it intends to consummate the proposed transaction if selected as the Winning Bidder or the Winning Back-Up Bidder, Kroll and LNBYG will identify, confirm and describe the Opening

1 Bid.

2       The bidding will then ensue in the bidding order provided by Kroll to all Qualified  
3 Bidders in advance of the Auction. All bidding after the Opening Bid shall continue in bidding  
4 increments of at least \$100,000 or figures that are wholly divisible by \$100,000. All bids will be  
5 made and received in one room (or otherwise in the presence via Zoom, Webex or similar virtual  
6 means of all parties), on an open basis, and all Qualified Bidders will be entitled to be present for  
7 all bidding with the understanding that the true identity of each bidder will be fully disclosed to  
8 all Qualified Bidders before the Auction and the material terms of each Qualified Bid submitted  
9 prior to the Auction, and all successive bids made at the Auction, will be fully disclosed to all  
10 Qualified Bidders. All Qualified Bidders will be permitted to bid at the Auction based on what  
11 Kroll and LNBYG determines to be an appropriate amount of time to respond to each prior  
12 submitted bid.  
13  
14

15       Prior to the Auction, Kroll will randomly assign to each Qualified Bidder a bidder  
16 number, except that the Bidder whose bid was accepted as the Opening Bid will be assigned  
17 bidder number 1. Once the Opening Bid has been described by Kroll and LNBYG, the bidding  
18 will then pass to Bidder number 2. Bidder number 2 will have the option of submitting an  
19 overbid to the Opening Bid of at least \$100,000 or dropping out of the Auction. Once a Bidder  
20 drops out of the Auction, the Bidder will no longer be permitted to participate in the Auction.  
21 After Bidder number 2 either submits a qualifying overbid or drops out of the Auction, the  
22 bidding will then pass to Bidder number 3. This process will continue until only two Qualified  
23 Bidders are left, in which case the Qualified Bidder who submits the highest Qualified Bid will  
24 be deemed the Winning Bidder at the Auction, and the Qualified Bidder who submits the second  
25 highest Qualified Bid will be deemed the Winning Back-Up Bidder at the Auction.  
26  
27  
28



1 Except as expressly provided in the Bidding Procedures Order or the provisions of the  
2 Bidding Procedures, the Debtors and Kroll shall have the right to conduct the Auction in the  
3 manner they reasonably determine, in the exercise of their business judgment, to be in the best  
4 interests of the Debtors' bankruptcy estates. The Debtors and Kroll shall also have the right to  
5 deviate from these Bidding Procedures without the need for any further order of the Bankruptcy  
6 Court if they reasonably determine, in the exercise of their business judgment, that doing so  
7 would be in the best interests of the Debtors' bankruptcy estates and is not inconsistent with any  
8 of the provisions of the Bankruptcy Code or any previously entered order of the Bankruptcy  
9 Court including the Bidding Procedures Order.  
10

11  
12 Kroll and LNBYG, in consultation with the Debtors, may (1) determine which Qualified  
13 Bid, if any, is the highest, best and otherwise financially superior offer and (2) reject at any time  
14 any Bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the  
15 Bankruptcy Code or these Bidding Procedures, or (iii) contrary to the best interests of the  
16 Debtors or their bankruptcy estates; provided that, the highest, best, and otherwise financially  
17 superior offer shall be the Qualified Bid at the Auction reasonably expected to result in the  
18 highest amount of money being paid to the Debtors for their purchase of the Purchased Assets.  
19

20 **Selection of the Winning Bid and Winning Back-Up Bid**

21 The Auction shall continue until there is one Qualified Bid that Kroll and LNBYG, in  
22 consultation with the Debtors, determines, subject to Bankruptcy Court approval, to be the  
23 highest and best bid (the "Winning Bid"), and another Qualified Bid to be the second highest and  
24 best bid (the "Winning Back-Up Bid"), at which point the Auction will be deemed concluded.  
25 The Debtors will not consider any Bids submitted after the conclusion of the Auction.  
26

27 Subject to the Bankruptcy Court approving the Winning Bid and entering an order  
28

1 approving of the Debtors' free and clear sale of the Purchased Assets to the Winning Bidder in  
2 accordance with the APA submitted by the Winning Bidder (the "Sale Order"), the Winning  
3 Bidder shall be requiring to close the Sale by August 12, 2022 (unless the Debtors and the  
4 Winning Bidder jointly agree to an extension of this outside Sale closing date which will be in  
5 their sole and absolute discretion), or the Winning Bidder will be deemed to have forfeited its  
6 Deposit to the Debtors. Promptly following the closing of the Sale to the Winning Bidder,  
7 LNBYG shall return the Deposit of the Winning Back-Up Bidder to the Winning Back-Up  
8 Bidder.  
9

10 If the Winning Bidder fails to close the Sale by August 12, 2022, unless the Debtors and  
11 the Winning Bidder mutually agree in their sole and absolute discretion to extend the closing  
12 date, Kroll shall so notify the Winning Back-Up Bidder. The Winning Back-Up Bidder will then  
13 have ten (10) days following the date of having been notified by Kroll to close the Sale. If the  
14 Winning Back-Up Bidder fails to close the Sale within this time period, unless the Debtors and  
15 the Winning Back-Up Bidder mutually agree in their sole and absolute discretion to extend the  
16 closing date, the Winning Back-Up Bidder will be deemed to have forfeited its Deposit to the  
17 Debtors.  
18  
19

#### 20 **Return of Deposits Following the Completion of the Auction**

21 Promptly following the completion of the Auction, LNBYG will return the Deposits of all  
22 Bidders except for the Deposits of the Winning Bidder and the Winning Back-Up Bidder.  
23

#### 24 **Sale Hearing**

25 The hearing for the Bankruptcy Court to approve the outcome of the Auction and the  
26 Debtors' sale of the Purchased Assets to the Winning Bidder and to the Winning Back-Up  
27 Bidder if the Winning Bidder fails to close (the "Sale Hearing") shall be held on  
28

\_\_\_\_\_, 2022, at \_\_:\_\_ a.m./p.m., or at such other date and time set by the Bankruptcy Court.

### III.

#### **PROPOSED SALE NOTICE AND CURE NOTICE**

Attached as **Exhibit “4”** to the Benn Declaration is the Debtors’ proposed form of notice to prospective buyers and other parties in interest (“Proposed Sale Notice”), and attached as **Exhibit “3”** to the Benn Declaration is the Debtors’ proposed form of notice to non-Debtor counterparties under executory contracts and unexpired leases regarding the possible assumption and assignment thereof (“Proposed Cure Notice”).

##### **A. Proposed Sale Notice.**

The Debtors will serve the Proposed Sale Notice upon all known creditors and equity holders and upon all prospective buyers (with the list to be provided to the Debtors’ counsel by Kroll) following Court approval of the Bidding Procedures. Kroll will also place a copy of the Bidding Procedures Order and all of its exhibits, including the Proposed Sale Notice, into the data room that Kroll established and is managing and will continuously deliver copies of all such documents to all future prospective buyers as their identities become known.

The Debtors submit that the notice, and service thereof, will satisfy the requirements of Rule 2002 of the Federal Rules of Bankruptcy Procedure, and that such notice will constitute proper, timely, adequate and sufficient notice of the Sale, the Bidding Procedures including any Bid Deadline, the Auction, the Sale Hearing, and the deadline to object to any Sale. Accordingly, the Debtors request that the Proposed Sale Notice, substantially in the form attached as **Exhibit “\_\_”** to the \_\_\_\_\_ Declaration be approved by the Court.

##### **B. Proposed Cure Notice.**

Similarly, the Debtors will serve the Proposed Cure Notice (substantially in the form attached to the proposed order granting the Motion) on each counterparty to an executory contract or unexpired lease, which notice shall: (i) state the cure amounts, if any, that the Debtors believe are necessary to assume such contracts or leases pursuant to Bankruptcy Code section

365 (the “Cure Amount”); (ii) notify the non-Debtor counterparty that such party’s contract or lease may be assumed and assigned to the Winning Bidder; (iii) state the date of the Sale Hearing and that objections to any Cure Amount or to assumption and assignment will be heard at the Sale Hearing, or at a later hearing, as determined by the Debtors; and (iv) state the deadline by which the non-Debtor counterparty shall file an objection to the Cure Amount(s) or to the assumption and assignment of the applicable contract(s) and/or lease(s).

In connection with the scheduling of the Sale Hearing, the Debtors request that the Court also establish a deadline by which any objection to the Cure Amount or the assumption and assignment of the applicable contract(s) and/or lease(s) (the “Cure Objection Deadline”) must be filed with the Court. As provided for in the Proposed Cure Notice, the Debtors request that any such objection must also state (i) the basis for such objection and (ii) with specificity what Cure Amount(s) the non-Debtor counterparty to the relevant executory contract(s) or unexpired lease(s) believes is required (in all cases with appropriate documentation in support thereof).

The proposed assumption and assignment procedure, which includes the Proposed Cure Notice, also provides for the following terms which the Debtors believe are appropriate and reasonable under the circumstances of these cases:

(1) Any objection solely to the Cure Amount(s) may not prevent or delay the Debtors’ assumption and assignment of assumed and assigned contract(s) or lease(s). If a party objects solely to Cure Amount(s), the Debtors may, with the consent of the Winning Bidder, hold the claimed Cure Amount(s) in reserve pending further order of the Court or mutual agreement of the parties. So long as the Cure Amount is held in reserve, and there are no other unresolved objections to assumption and assignment of the applicable assumed and assigned contract(s) or lease(s), the Debtors can, without further delay, assume and assign such contract(s) or lease(s) to the Winning Bidder. Under such circumstances, the objecting non-Debtor counterparty’s recourse is limited to the funds held in reserve.

(2) If no objection to the Cure Amount(s) is timely received, the Cure Amount(s) set forth in the Proposed Cure Notice shall be controlling notwithstanding anything to the contrary

1 in any assigned contract(s) or lease(s) or other document(s) as of the date of the Proposed Cure  
2 Notice.

3 (3) Within one day following the conclusion of the Auction, the Winning Bidder will  
4 be required to provide to the Debtors a list of those executory contracts and unexpired leases that  
5 the Winning Bidders elects to have assumed and assigned (the “Designated Contracts”) to the  
6 Winning Bidder at Closing pursuant to Bankruptcy Code Section 365, subject to the Winning  
7 Bidder’s right to add or delete executory contracts or unexpired leases. The Debtors will  
8 thereafter notify the counter-parties to the Designated Contracts of the Winning Bidder’s  
9 preliminary determination in this regard.

10 (4) To the extent that any non-Debtor counterparty wishes to object to the adequate  
11 assurance of future performance by the Winning Bidder under the applicable executory  
12 contract(s) or unexpired lease(s), then such non-Debtor counterparty shall file a written objection  
13 with the Court at least one day prior to the Sale Hearing.

14 (5) To the extent that any non-Debtor counterparty does not timely file and serve an  
15 objection as set forth above, such counterparty will be: (i) deemed to have consented to the Cure  
16 Amount(s), if any, set forth in the Cure Notice; (ii) barred, estopped and enjoined from asserting  
17 any additional Cure Amount(s) or pecuniary loss under the assumed and assigned executory  
18 contract(s) or unexpired lease(s); (iii) barred from objecting to the assumption and assignment of  
19 the applicable assumed and assigned executory contract(s) or unexpired lease(s) to the Winning  
20 Bidder, and (iv) barred from objecting to adequate assurance of future performance by the  
21 Winning Bidder.

22 (6) The inclusion of a contract on a Cure Notice shall not constitute or be deemed a  
23 determination or admission by the Debtors, the Winning Bidder or any other party in interest that  
24 such document is, in fact, an executory contract or unexpired lease within the meaning of the  
25 Bankruptcy Code or that such contract or lease will be assumed in connection with the Sale of  
26 the Purchased Assets. The Debtors reserve all of its rights, claims and causes of action with  
27 respect to the contracts or leases listed on the Cure Notice.

28 The Debtors submit that the Proposed Cure Notice is reasonably calculated to provide

sufficient effective notice to all non-Debtor counterparties to assumed and assigned contracts or leases and any other affected parties of the Debtors' intent to assume and assign some or all of such contracts or leases and to afford the non-Debtor counterparty to each such contract or lease the opportunity to exercise any rights affected by the Motion pursuant to Bankruptcy Rules 2002, 6004 and 6006, and should be approved.

#### IV.

#### **DISCUSSION**

Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate...." 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code provides in pertinent part that "[t]he Court may issue any order, process or judgment that is necessary and appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

#### **A. The Proposed Bidding Procedures Should Be Approved By The Court.**

Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") govern the scope of the notice to be provided in the event a debtor elects to sell property of the estate under Section 363; however, with respect to the procedures to be adopted in conducting a sale outside the ordinary course of a debtor's business, Bankruptcy Rule 6004 provides only that such sale may be by private sale or public auction, and requires only that the debtor provide an itemized list of the property sold together with the prices received upon consummation of the sale. Fed. R. Bankr. Proc. 6004(f). With that said, Local Bankruptcy Rule 6004-1 provides, in pertinent part, as follows:

#### **(b) Motion for Order Establishing Procedures for the Sale of Estate Property.**

...

(2) Contents of Notice [of a Sale Procedure Motion]. The notice must describe the proposed bidding procedures and include a copy of the proposed purchase agreement. If the purchase agreement is not available, the moving party must describe the terms of the sale proposed, when a copy of the actual agreement will be filed with the court, and from whom it may be obtained.

1 The notice must describe the marketing efforts undertaken and the  
2 anticipated marketing plan, or explain why no marketing is  
3 required. ...

4 (3) Service of the Notice and Motion. The moving party  
5 must serve the motion and notice of the motion and hearing by  
6 personal delivery, messenger, telephone, fax, or email to the  
7 parties to whom notice of the motion is required to be given by the  
8 FRBP or by these rules, any other party that is likely to be  
adversely affected by the granting of the motion, and the United  
States trustee. The notice of hearing must state that any response in  
opposition to the motion must be filed and served at least 1 day  
prior to the hearing, unless otherwise ordered by the court.

9 ...

10 Local Bank. R. 6004-1(b).

11 The Debtors respectfully submit that all of the information required under Local  
12 Bankruptcy Rule 6004-1(b)(2) to be provided in a notice of a bidding procedures motion has  
13 been included in the Notice of Motion filed and served concurrently herewith.

14 Further, Local Bankruptcy Rule 6004-1(b)(1) provides for the consideration and approval  
15 of a bidding procedures motion on not less than seven (7) days' notice. The Debtors are  
16 requesting the Court to approve the Bidding Procedures at the cash collateral hearing already  
17 scheduled to be held on June 30, 2022 at 10 a.m., which would comply with the 7-day notice  
18 requirement of the Local Bankruptcy Rules.

19 Neither the Bankruptcy Code nor the Bankruptcy Rules contain specific provisions with  
20 respect to the procedures to be employed by a debtor in conducting a public or private sale.  
21 Nonetheless, as one Court has stated, "It is a well-established principle of bankruptcy law that  
22 the objective of bankruptcy rules and the [debtors'] duty with respect to such sales is to obtain  
23 the highest price or greatest overall benefit possible for the estate." *In re Atlanta Packaging*  
24 *Products, Inc.*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988). Additionally, courts have long  
25 recognized the need for competitive bidding at hearings on private sales; "[c]ompetitive bidding  
26 yields higher offers and thus benefits the estate. Therefore, the objective is 'to maximize  
27 bidding, not restrict it.'" *Id.*

1 A corollary to these principles is that the court should not “cherry-pick” among  
2 contractual provisions, objecting to select individual portions, if the agreement as a whole is  
3 supported by an articulated business judgment. At least one bankruptcy court has expressly  
4 applied this corollary to a transaction including breakup and overbid provisions in the sale of the  
5 debtor’s business. In *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877 (Bankr. S.D.N.Y.  
6 1990), the court approved a transaction including provisions relating to a breakup fee and a  
7 requirement that overbids be at least \$500,000. In responding to objections to other provisions  
8 of the agreement, the court held that:

9 The Court is not to second guess the inclusion of some  
10 provisions as long as the Agreement as a whole is within  
11 reasonable business judgment, and the subject provisions do  
12 not distort the balance Congress struck in Chapter 11. *Cf. In re*  
13 *Ames Dep’t Stores, Inc., Eastern Retailers Service Corp., et al.*,  
14 115 B.R. 34, 37-38 (Bankr. S.D.N.Y. 1990) (some contractual  
provisions may be justified by the need to attract a prospective  
investor.).

15 114 B.R. at 886.

16 The Debtors believe that the proposed Bidding Procedures provide a structure for the sale  
17 of the Purchased Assets that is designed to insure that the highest and best price is paid for the  
18 Purchased Assets and that the sale closing occurs at the earliest reasonable possible date under  
19 the circumstances of these bankruptcy cases.

20 As a whole, the Debtors believe that the Bidding Procedures will (i) foster competitive  
21 bidding among any serious potential purchasers; (ii) sufficient time is being provided to insure  
22 that any and all interested parties are able to participate in the Auction process if they desire to  
23 do so; (iii) eliminate from consideration potential purchasers who do not have the financial  
24 ability to consummate their purchase in a timely manner or at a price point that makes no sense  
25 for these estates; and (iv) ensure that the highest possible purchase price is obtained for the  
26 Purchased Assets. The Debtors will only bring a stalking horse bid before the Court for approval  
27 if the Debtors, in consultation with Kroll, conclude that doing so will benefit these estates and  
28 further the goal of achieving the highest and best price for the Purchased Assets.



1 The Debtors therefore submit that the proposed Bidding Procedures are in the best  
2 interests of their bankruptcy estates, are necessary and appropriate to maximize the recovery for  
3 their bankruptcy estates, and should be approved by the Court as a sound exercise of the  
4 Debtors' business judgment. Importantly, the Debtors are not seeking at this time to have the  
5 Court approve the actual sale of the Purchased Assets. That request will be set forth in a separate  
6 sale motion to be filed by the Debtors and considered by the Court at the Sale Hearing. The  
7 Debtors are at this time only seeking Court approval of the Bidding Procedures and related  
8 matters so that the entire market place can be advised as soon as possible exactly what they need  
9 to do in order to participate in this asset sale process.

10 **B. The Court Should Also Approve The Assumption And Assignment Procedures Of**  
11 **the Designated Contracts.**

12 Barring exceptions not herein relevant, sections 365(a) and 1107(a) authorizes a debtor in  
13 possession, "subject to the Court's approval, ... [to] assume or reject any executory contract or  
14 unexpired lease of the debtor." A debtor in possession may assume or reject executory contracts  
15 for the benefit of the estate. In re Klein Sleep Products, Inc., 78 F.3d 18, 25 (2d. Cir. 1996); In re  
16 Central Fla. Metal Fabrication, Inc., 190 B.R. 119, 124 (Bankr. N.D. Fla. 1995); In re Gucci, 193  
17 B.R. 411, 415 (S.D.N.Y. 1996). In reviewing a debtor in possession's decision to assume or  
18 reject an executory contract, a bankruptcy court should apply the "business judgment test" to  
19 determine whether it would be beneficial to the estate to assume it. In re Continental Country  
20 Club, Inc., 114 B.R. 763, 767 (Bankr. M.D. Fla. 1990); see also In re Gucci, 193 B.R. at 415.  
21 The business judgment standard requires that the court follow the business judgment of the  
22 debtor unless that judgment is the product of bad faith, whim, or caprice. In re Prime Motors  
23 Inns, 124 B.R. 378, 381 (Bankr. S.D. Fla. 1991), citing Lubrizol Enterprises v. Richmond Metal  
24 Finishers, 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986).

25 Pursuant to section 365(f)(2) of the Bankruptcy Code, a debtor may assign its executory  
26 contracts and unexpired leases, provided the debtor first assumes such executory contracts and  
27 unexpired leases in accordance with section 365(b)(1), and provides adequate assurance of future  
28 performance by the assignee. Pursuant to section 365(b)(1), assumption of executory contracts

1 and unexpired leases requires a debtor to: (a) cure any existing defaults under such agreements;  
2 (b) compensate all non-debtor parties to such agreements for any actual pecuniary loss resulting  
3 from the defaults; and (c) provide adequate assurance of future performance under the contract or  
4 lease. 11 U.S.C. § 365(b)(1); see also In re Bowman, 194 B.R. 227, 230 (Bankr. D. Ariz. 1995);  
5 In re AEG Acquisition Corp., 127 B.R. 34, 44 (Bankr. C.D. Cal. 1991), aff'd 161 B.R. 50 (9th  
6 Cir. B.A.P. 1993). Pursuant to section 365(f)(1) of the Bankruptcy Code, a debtor may assign an  
7 executory contract or unexpired lease pursuant to section 365(f)(2) of the Bankruptcy Code  
8 notwithstanding any provision in such executory contract or unexpired lease that prohibits,  
9 restricts or conditions the assignment of such executory contract or unexpired lease.

10 The assumption and assignment of executory contracts furthers the goals of Chapter 11 of  
11 promoting reorganization by balancing the debtor's interest in maximizing the value of its estate  
12 against the contracting party's interest in receiving the benefit of its bargain and being protected  
13 against default by the debtor after assumption has occurred. In re Embers 86th Street, Inc., 184  
14 B.R. 892, 896 (Bankr. S.D.N.Y. 1995).

15 As part of this Motion, the Debtors are seeking approval of the procedures by which the  
16 Debtors will assume and assign to the Winning Bidder all of the Debtors' executory contracts  
17 and unexpired leases that the Winning Bidder desires. As indicated above, the Debtors propose  
18 to serve the Proposed Cure Notice (substantially in the form attached as Exhibit "3" to the Benn  
19 Declaration) on each counterparty to an executory contract or unexpired lease, which notice  
20 shall: (i) state the Cure Amount; (ii) notify the non-Debtor counterparty that such party's contract  
21 or lease may be assumed and assigned to the Winning Bidder; (iii) state the date of the Sale  
22 Hearing and that objections to any Cure Amount or to assumption and assignment will be heard  
23 at the Sale Hearing, or at a later hearing, as determined by the Debtors; and (iv) state the deadline  
24 by which the non-Debtor counterparty shall file an objection to the Cure Amount(s) or to the  
25 assumption and assignment of the applicable contract(s) and/or lease(s).

26 Since the identity of the Winning Bidder is not known at this time (and will not be known  
27 until the conclusion of the Auction), the Debtors have no way of knowing which executory  
28 contracts and unexpired leases, if any, the Winning Bidder will to have assigned to it.

1 Accordingly, the Debtors propose to serve the Proposed Cure Notice on every counterparty to all  
2 executory contracts or unexpired leases; thus, every counterparty to an executory contract or  
3 unexpired lease that could be subject to an assumption and assignment will have a meaningful  
4 opportunity to object, including to the Cure Amount. Thus, these parties will not be prejudiced  
5 by the proposed procedures for assumption and assignment of their executory contract or  
6 unexpired lease.

7 The Debtors submit that this procedure and the proposed notices are fair and reasonable  
8 under the circumstances of these cases.

9 **V.**

10 **CONCLUSION**

11 Based upon all of the foregoing, the Debtors respectfully request that this Court do the  
12 following:

- 13 (1) Grant this Motion in its entirety;
- 14 (2) Enter the Bidding Procedures Order in substantially the form appended as **Exhibit**  
15 **“1”** to the Benn Declaration;
- 16 (3) Approve the Bidding Procedures substantially in the form described in **Exhibit**  
17 **“2”** attached to the Benn Declaration for the sale of the Purchased Assets free and  
18 clear of all liens, claims, encumbrances and other interests;
- 19 (4) Establish and approve procedures relating to the Debtors’ assumption and  
20 assignment of executory contracts and unexpired leases and which approves the  
21 form of notice to be provided to all counterparties to executory contracts and  
22 unexpired leases attached as **Exhibit “3”** to the Benn Declaration;
- 23 (5) Approve the Debtors’ proposed form of notice to be sent to all creditors, equity  
24 holders, proposed buyers and other parties in interest in the form attached as  
25 **Exhibit “4”** to the Benn Declaration;
- 26 (6) Approve the Template APA (without exhibits) in the form attached as **Exhibit**  
27 **“5”** to the Benn Declaration;
- 28

- 1 (7) Schedule the Auction for August 23, 2022 as requested in the Motion;  
2 (8) Schedule the Sale Hearing for the Court to consider approval of the Debtors' sale  
3 of the Purchased Assets to the winning bidder and winning back-up bidder at the  
4 Auction; and  
5 (9) Grant such other and further relief as the Court deems just and proper under the  
6 circumstances.

7 Dated: June 23, 2022

TRX HOLDCO, LLC  
FITNESS ANYWHERE LLC

9 By: /s/ Ron Bender  
10 RON BENDER  
11 KRIKOR J. MESHEFEJIAN  
12 LINDSEY L. SMITH  
13 LEVENE, NEALE, BENDER,  
14 YOO & GOLUBCHIK L.L.P.  
15 Proposed Attorneys for Chapter 11 Debtors  
16 and Debtors in Possession  
17  
18  
19  
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21  
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23  
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28

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
2818 La Cienega Avenue, Los Angeles, CA 90034

A true and correct copy of the foregoing document entitled (*specify*): **DEBTORS' MOTION FOR ENTRY OF ORDER (I) ESTABLISHING BIDDING PROCEDURES FOR FREE AND CLEAR SALE OF ASSETS; (II) ESTABLISHING PROCEDURES RELATING TO ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (III) APPROVING FORMS OF NOTICE; (IV) APPROVING FORM OF ASSET PURCHASE AGREEMENT; (V) SCHEDULING AN AUCTION; (VI) SCHEDULING A SALE HEARING; AND (VII) GRANTING RELATED RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) **June 23, 2022**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Ron Bender rb@lnbyb.com
- Shawn M Christianson cmcintire@buchalter.com, schristianson@buchalter.com
- Michael I. Gottfried mgottfried@elkinskalt.com, cavila@elkinskalt.com
- Jonathan Gottlieb jd@lnbyg.com
- Michael J Hauser michael.hauser@usdoj.gov
- Marsha A Houston mhouston@reedsmith.com, hvalencia@reedsmith.com
- Krikor J Meshefejian kjm@lnbyg.com
- Ali M Mojdehi amojdehi@btlaw.com, jgertz@btlaw.com; arego@btlaw.com; amattngly@btlaw.com
- Christopher O Rivas crivas@reedsmith.com, chris-rivas-8658@ecf.pacerpro.com
- Lindsey L Smith lls@lnbyg.com, lls@ecf.inforuptcy.com
- United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov

**2. SERVED BY UNITED STATES MAIL:** On (*date*) **June 23, 2022**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) **June 23, 2022**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

### **SERVED BY PERSONAL DELIVERY**

Honorable Scott C. Clarkson  
U.S. Bankruptcy Court, Ronald Reagan Federal Building  
411 West Fourth Street  
Suite 5130  
Santa Ana, CA 92701-4593

☒ Service information **BY OVERNIGHT MAIL** continued on attached page

☒ Service information **BY EMAIL** continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

June 23, 2022  
*Date*

Lourdes Cruz  
*Printed Name*

/s/ Lourdes Cruz  
*Signature*

In re Fitness Anywhere LLC and  
TRX  
File No. 9745  
RSN UST, 20 Largest and Secured  
EMAIL LIST

Core Health & Fitness, LLC  
Sy Mares  
[smares@corehandf.com](mailto:smares@corehandf.com)

Office of the U.S. Trustee  
Michael J Hauser  
[Michael.hauser@usdoj.gov](mailto:Michael.hauser@usdoj.gov)

Flexport Inc  
[alyssa@flexport.com](mailto:alyssa@flexport.com)

Dirbos Inc.  
[jon@dirbos.com](mailto:jon@dirbos.com)  
(949) 466-1897

Duane Morris LLP  
Michael J. Silverman  
[mjsilverman@duanemorris.com](mailto:mjsilverman@duanemorris.com)

NetSuite Inc  
[Carmina.espinola@oracle.com](mailto:Carmina.espinola@oracle.com)

ISUPPORT WORLDWIDE LLC  
Courtney Bissett  
[cbissett@isupportworldwide.com](mailto:cbissett@isupportworldwide.com)

Syzygy Digital Marketing, Inc  
[finance@syzygy.us](mailto:finance@syzygy.us)  
Geanina Scupici  
[Geanina.Scupici@syzygy.co.uk](mailto:Geanina.Scupici@syzygy.co.uk)

Sprint FWD, LLC  
Bryan Arp  
[bryanarp@gmail.com](mailto:bryanarp@gmail.com)

Counsel for Creative Artists Agency  
Michael I. Gottfried, Esq.  
[mgottfried@elkinskalt.com](mailto:mgottfried@elkinskalt.com)

McCollister's Transportation Group, Inc  
[sschukraft@mccollisters.com](mailto:sschukraft@mccollisters.com)

UDR-Eight 80  
[rholly@udr.com](mailto:rholly@udr.com)

Morrison & Foerster LLP  
Murray A. Indick  
[mindick@mofo.com](mailto:mindick@mofo.com)

Woodforest National Bank  
[mhouston@reedsmith.com](mailto:mhouston@reedsmith.com)  
[crivas@reedsmith.com](mailto:crivas@reedsmith.com)

SprintFWD, LLC  
Bryan Arp  
[bryanarp@gmail.com](mailto:bryanarp@gmail.com)

Comma,8 LLC  
Bryan Arp  
[bryanarp@gmail.com](mailto:bryanarp@gmail.com)

Counsel for Core Health & Fitness, LLC  
Ali M.M. Mojdehi **RSN**  
[amojdehi@btlaw.com](mailto:amojdehi@btlaw.com)  
[arego@btlaw.com](mailto:arego@btlaw.com)

Email block:

[smares@corehandf.com](mailto:smares@corehandf.com); [Michael.hauser@usdoj.gov](mailto:Michael.hauser@usdoj.gov); [alyssa@flexport.com](mailto:alyssa@flexport.com); [jon@dirbos.com](mailto:jon@dirbos.com); [mjsilverman@duanemorris.com](mailto:mjsilverman@duanemorris.com);  
[Carmina.espinola@oracle.com](mailto:Carmina.espinola@oracle.com); [cbissett@isupportworldwide.com](mailto:cbissett@isupportworldwide.com); [finance@syzygy.us](mailto:finance@syzygy.us); [bryanarp@gmail.com](mailto:bryanarp@gmail.com);  
[mgottfried@elkinskalt.com](mailto:mgottfried@elkinskalt.com); [sschukraft@mccollisters.com](mailto:sschukraft@mccollisters.com); [rholly@udr.com](mailto:rholly@udr.com); [mindick@mofo.com](mailto:mindick@mofo.com); [mhouston@reedsmith.com](mailto:mhouston@reedsmith.com);  
[crivas@reedsmith.com](mailto:crivas@reedsmith.com); [bryanarp@gmail.com](mailto:bryanarp@gmail.com); [amojdehi@btlaw.com](mailto:amojdehi@btlaw.com); [arego@btlaw.com](mailto:arego@btlaw.com)

In re TRX Holdco, LLC  
File No. 9745  
RSN UST, 20 Largest, Secured  
SERVICE BY OVERNIGHT MAIL

Michael J Hauser  
United States Trustee  
411 W Fourth St Suite 7160  
Santa Ana, CA 92701-4593

Baker Tilly US, LLP  
10 Terrace Court PO Box 7398  
Madison, WI 53707-7398

Cole Schotz P.C.  
25 Main Street P.O. Box 800  
Hackensack, NJ 07602

Creative Artists Agency  
Attn: Jeffrey Freedman  
2000 Avenue of the Stars  
Los Angeles, CA 90067

JMBM LLP  
1900 Avenue of the Stars  
Los Angeles, CA 90067

Morrison & Morrison  
222 Souther Riverside Plaza  
Chicago, IL 60606

Sterling Legal Solutions, Inc.  
Attn: Stephanie Sterling  
26895 Aliso Creek Rd., B-129  
Aliso Viejo, CA 92656

UDR-Eight 80  
1590 Adams Avenue  
PO Box 2350  
Costa Mesa, CA 92628

UDR-Eight 80  
Agent for Service of Process  
330 N. Brand Blvd., Suite 700  
Glendale, CA 91203

Sterling Legal Solutions, Inc.  
Agent for Service of Process  
720 14<sup>th</sup> Street  
Sacramento, CA 95814

SprintFWD, LLC  
Attn: Bryan Arp  
703 Pier Avenue, Suite B #632  
Hermosa Beach CA 90254-0000

Comma,8 LLC  
Attn: Bryan Arp  
703 Pier Avenue, Suite B #632  
Hermosa Beach CA 90254-0000



In re Fitness Anywhere LLC  
File No. 9744  
RSN UST, 20 Largest and Secured  
SERVICE BY OVERNIGHT MAIL

Counsel for Woodforest National Bank  
ReedSmith  
Marsha Houston/Christopher Rivas  
355 South Grand Avenue, Suite  
2900 Los Angeles, CA, 90071

Michael J Hauser  
United States Trustee  
411 W Fourth St Suite 7160  
Santa Ana, CA 92701-4593

Committee  
Exemplar Design, LLC  
Attention: Matt Nelson  
4680 Parkway Drive, Suite 300  
Mason, OH 45040

Committee  
Core Health & Fitness, LLC  
Attention: Sy Mares  
4400 NE 77th Avenue, Suite 250  
Vancouver, WA 98662

Committee  
United Parcel Service, Inc.  
Attention: Farah C. Spainhour  
55 Glenlake Parkway  
Atlanta, GA 30328

Morrison & Foerster LLP  
Attn: Murray A. Indick  
425 Market Street  
San Francisco CA 94105-0000

Core Health & Fitness, LLC  
4400 Northeast 77th Avenue  
Suite 300  
Manufacturer Land America  
Vancouver, WA 98662

Stephen Gould Corporation  
35 South Jefferson Road  
Whippany, NJ 07981

Flexport Inc  
P.O. Box 207244  
Dallas, TX 75320-7244

UPS Plan 0386NE  
55 Glenlake Parkway NE  
Atlanta, GA 30328

Duane Morris LLP  
30 South 17th Street  
Philadelphia, PA 19103-4196

Buy Box Experts  
3020 N Cullen Ct. Pleasant  
Grove, UT 84062

MAN Staffing, LLC  
550 East Del Amo Boulevard  
Carson, CA 90746

Syzygy Digital Marketing, Inc  
41 Flatbush Avenue  
Brooklyn, NY 11217

Lahlouh Inc  
Attn: H. John Lahlouh  
1649 Adrian Road  
Burlingame, CA 94010

US Customs and Border Protection  
PO BOX 979126  
St. Louis, MO 63197-9000

McCollister's Transportation Group, Inc  
8 Terri Lane  
Burlington, NJ 08016

NetSuite Inc  
500 Oracle Parkway  
Redwood City, CA 94065

Google  
P.O. Box 39000  
San Francisco, CA 94139

AMEX Corp Card  
P.O. Box 0001  
Los Angeles, CA 90096

The Trade Desk  
42 N Chestnut St.  
Ventura, CA 93001

Dirbos Inc.  
27758 Santa Margarita Pkwy  
Suite 366  
Mission Viejo, CA 92691

Redwood Supply Chain Solutions  
1765 North Elston Avenue Suite 216  
Chicago, IL 60642

USA Global Logistics LLC  
255 Madsen Drive  
Bloomingdale, IL 60108

ISUPPORT WORLDWIDE LLC  
1019 West James St  
Kent, WA 98032

Core Health & Fitness, LLC  
Agent for Service of Process  
330 N. Brand Blvd, Ste 700  
Glendale, CA 91203

Stephen Gould Corporation  
Agent for Service of Process  
2710 Gateway Oaks Drive  
Ste 150N  
Sacramento, CA 95833

Flexport Inc.  
Agent for Service of Process  
5716 Corsa Ave.  
Ste 110  
Westlake Village, CA 91362

United Parcel Service, Inc.  
Agent for Service of Process  
2710 Gateway Oaks Dr.  
Ste 150N  
Sacramento, CA 95833

McCollister's Transportation  
Systems, Inc.  
Agent for Service of Process  
2710 gateway Oaks Dr.  
Ste 150N  
Sacramento, CA 95833

Netsuite Inc.  
Agent for Service of Process  
2710 Gateway Oaks Dr.  
Ste 150N  
Sacramento, CA 95833

Google  
Agent for Service of Process  
2710 Gateway Oaks Dr.  
Ste 150N  
Sacramento, CA 95833

Man Staffing LLC  
Attn: Miguel A Navarro  
550 E Del Amo Blvd.  
Suite C  
Carson, CA 90746

Trade Desk  
Agent for Service of Process  
2710 Gateway Oaks Dr.  
Ste 150N  
Sacramento, CA 95833

Dirbos  
Agent for Service of Process  
101 N. Brand Blvd. 11<sup>th</sup> Floor  
Glendale, CA 91203

Redwood Logistics LLC  
C/O COGENCY GLOBAL INC.  
1325 J STREET STE 1550  
SACRAMENTO, CA 95814

Counsel for Creative Artists Agency  
Michael I. Gottfried, Esq. **RSN**  
Elkins Kalt Weintraub Reuben  
Gartside LLP 10345 W. Olympic Blvd.  
Los Angeles, CA 90064

Counsel for Core Health & Fitness, LLC  
Ali M.M. Mojdehi **RSN**  
Barnes & Thornburg LLP  
655 West Broadway, Suite 1300  
San Diego, CA 92101

Sprint FWD, LLC  
Attn: Bryan Arp  
703 Pier Avenue  
Suite B #632  
Hermosa Beach CA 90254-0000